NO. 22105

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERBOLD LABORATORY, INC. and
MILTON HERBOLD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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JURISDICTION

Appellant seeks by this appeal to review a final judgment entered in favor of the appellee, United States of America. The court below had jurisdiction under 28 U.S.C. §1345. The judgment, entered March 10, 1967, being a final decision, this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE

The appellee is in substantial agreement with the appellants' statement of facts. However, the appellee does not agree with the statement found on page 8 of the Appellants' Opening Brief that the pleadings did not allege any facts showing any basis for injunctive

relief. The Second Amended Complaint, page 2, Transcript of Record, alleges a large number of violations of the Cease and Desist Order in six counts. The facts contained in these allegations support the injunction granted by the trial court.

In addition, the appellee would point out that the appellants admitted the publication of the advertisements referred to in Counts Three through Six of the Second Amended Complaint [T. R. 30-32; 34-35]. 1/ Finally, the appellee disputes the contention found on page 8 of the Appellants' Opening Brief that there is no finding of fact to support a judgment granting injunctive relief. The appellee contends that a sufficient finding was contained in the Findings of Fact and Conclusions of Law filed March 9, 1967 [T. R. 95], and in the Memorandum Decision on Motion for New Trial filed May 1, 1967 [T. R. 201].

ISSUES PRESENTED

The issues presented on this appeal are:

1. Were the advertisements, which were the subject matter of Counts Three, Four, Five and Six of the Second Amended Complaint, disseminated in interstate commerce?

2. Was the Finding of Fact made on January 26, 1967 [T. R. 90], that the statements made in the advertisements in Counts Three, Four and Five represent that Herbold Pomade will impart the former natural shade or color to gray streaked or

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1/ Transcript of Record.

faded hair clearly erroneous?

3. Did the District Court have subject matter jurisdiction over the penalty action?

4. If the District Court had the power to issue an injunction, did it abuse its discretion in granting the injunction?

5. Did the District Court have power to issue an injunction?

SUMMARY OF ARGUMENT

Section 4 of the Federal Trade Commission Act defines commerce as follows:

> " 'Commerce' means commerce . . . in the District of Columbia, ... "

The Second Amended Complaint [T. R. 2] alleged in paragraph 4 the Cease and Desist Order which is the subject matter of this litigation. By terms of the Cease and Desist Order the defendants were ordered to cease and desist from disseminating or causing to be disseminated by means of the United States Mails or by means in commerce as "commerce" is defined in the Federal Trade Commission Act. In their Answers to the Second Amended Complaint, the defendants admitted the publication of the advertisements involved in Counts Three, Four and Five in the Washington Post and the Washington Star. This publication was a violation of the Cease and Desist Order under the definition of "commerce"

meaning commerce in the District of Columbia. The trial court was correct in taking judicial notice that the Washington Post, the Evening Star and the National Enquirer are circulated in interstate commerce.

The trial court found as a matter of fact that the advertisements involved in Counts Three, Four, Five and Six of the Second Amended Complaint violated the Cease and Desist Order. This finding should not be disturbed unless clearly erroneous. The findings that the advertisements violated the Cease and Desist Order was not only not clearly erroneous, it was the correct decision.

The District Court had subject matter jurisdiction of the penalty action because the facts of this case were certified to the Attorney General by the Federal Trade Commission and required by law.

The trial court's finding that the government was entitled to an injunction based on the facts alleged and proved at trial should not be disturbed unless it is clearly erroneous. There is no merit to the appellants' argument that the trial court should not have imposed the injunction because it was specifically asked for for the first time at trial.

The District Court had equitable jurisdiction and the power to issue an injunction. The case of United States v. Parkinson, 240 F. 2d 918 (9th Cir. 1956), is an inaccurate statement of the law and, insofar as it bears on this case, should be overruled.

ARGUMENT

I

THE ADVERTISEMENTS WHICH WERE THE SUBJECT MATTER OF COUNTS THREE, FOUR, FIVE AND SIX OF THE SECOND AMENDED COMPLAINT WERE DISSEMINATED IN INTERSTATE COMMERCE.

At page 12 of their Opening Brief, the appellants listed as an issue presented possible error by the trial court in finding that the advertisements were disseminated in interstate commerce. The appellants argued this question starting at page 46 of their Opening Brief. This issue and suggestion of error is completely unfounded. The express terms of the cease and desist order which gave rise to the allegations in Counts Three, Four, Five and Six of the Second Amended Complaint were that the appellants were not to disseminate certain advertising in commerce, as commerce is defined by the Federal Trade Commission Act. Section 4 of the Act defines commerce as follows:

> " 'Commerce' means commerce . . . in the District of Columbia. "

The appellants admitted the publication of the advertising which the plaintiff alleged violated the cease and desist order in the Washington Post and the Washington Morning and Evening Stars. The dissemination in commerce having been admitted by the appellants, proof on this question was unnecessary and there was no issue at trial about dissemination insofar as the Washington, D. C. papers were concerned.

The dissemination in commerce was also established by the trial court's having taken judicial notice of the fact that the National Inquirer, the Washington Post and the Washington Evening Star are disseminated in interstate commerce. It is the appellee's position, first that this taking of judicial notice was entirely proper by the trial court and, second that the appellants are in no position to present any issues about interstate dissemination. The court's taking judicial notice of the fact that the National Inquirer, the Washington Post and the Washington Star are newspapers which are circulated in interstate commerce was a correct application of the doctrine of judicial notice. In the California case of In Re Lawrence, 55 Cal. App. 2d 491, 497 (1942), the court used the following language:

> "Knowledge that is generally possessed is the subject of judicial cognizance, and the courts will not shut their eyes and ears to the every-day happenings of contemporary life."
>
> In Re Lawrence, supra, at 497.

Broad application has been given to the doctrine of judicial notice in the Ninth Circuit. In the early case of Greeson v. Imperial Irr. Dist., 59 F. 2d 529, 531 (9th Cir. 1932), the court stated that, "Judicial knowledge is taken of all matters generally known."

More directly in point is the case of Delbridge v. United States, 262 F. 2d 710, 720 (D. C. Cir. 1958). The common sense of the court's ruling in this case is supported by the discussion of

judicial notice in the article Evidence of the New Federal Rules of Civil Procedure, by Charles C. Callahan and Edwin E. Ferguson, 47 Yale L. J. 194, 210, et seq., in which the authors suggest that the courts should take judicial notice of any matter of common knowledge or of any matter not capable of bona fide dispute. The Government submits that the appellants cannot in good faith dispute the fact that the National Inquirer, the Washington Post, and the Washington Star are circulated in interstate commerce.

The second reason for the appellee's argument that the appellants cannot now raise the question of dissemination in interstate commerce relates to the plaintiff's cross-motion for summary judgment filed on November 17, 1966 [T. R. 78]. In that motion the Government contended that there was no genuine issue of fact as to the defendant Herbold Laboratories, Inc. on Counts Three, Four, Five and Six of the Second Amended Complaint. Rule 3(g)2, Local Rules for the Central District of California, requires any person opposing a motion for summary judgment to serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. No such statement of genuine issues was ever filed by the defendant Herbold Laboratories, Inc. At the hearing on the motion for summary judgment the court found that there were no genuine issues of fact remaining to be tried as against the defendant Herbold Laboratories, Inc. on Counts Three, Four, Five and Six of the plaintiff's Second Amended Complaint. In the objections to the findings of fact proposed by

the plaintiff on the plaintiff's cross-motion for summary judgment, filed December 13, 1966, the defendant Herbold Laboratories made this statement:

> "(c) Furthermore, issues of fact still remain as to whether the advertisements were or were not disseminated in interstate commerce contrary to the cease and desist order."

The Findings of Fact filed January 27, 1967 [T.R. 88], included a finding that the advertisements in Counts Three, Four, Five and Six were disseminated in interstate commerce. Because the defendant violated the local rule for the Central District by not filing a statement of genuine issues, and because the defendant cannot in good faith contend that the Washington Post and Washington Star and National Inquirer were not disseminated in interstate commerce, the action of the trial court in taking judicial notice of this fact should be upheld.

This is especially true in light of the defendants both having admitted dissemination in commerce within the meaning of the Federal Trade Commission Act.

II

THE FINDING THAT ADVERTISEMENTS ALLEGED IN COUNTS THREE, FOUR, FIVE AND SIX VIOLATED THE CEASE AND DESIST ORDER WAS NOT "CLEARLY ERRONEOUS".

Beginning at page 54 of their Opening Brief, the appellants argue that factually the advertisements involved in Counts Three, Four, Five and Six of the Second Amended Complaint do not violate the terms of the cease and desist order. In advancing this argument the appellants have presented the court authority which does not support their position on the question of the applicability of Rule 52(a), Federal Rules of Civil Procedure. The appellants cite the cases of United States v. El-O-Pathic Pharmacy, 192 F. 2d 62 (9th Cir. 1951); Brinker-Johnson Co. v. Barnes, 272 F. 2d 250 (9th Cir. 1959); and Kwikset Locks, Inc. v. Hillgren, 210 F. 2d 483 (9th Cir. 1954). The Kwikset Locks case deals with patents and is entirely inapplicable to the facts of this case. The El-O-Pathic Pharmacy case, beginning at page 67, recites as follows:

> "[N]evertheless a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed; [citing cases]."

This language is hardly compatible with the appellants'

statement that the "clearly erroneous" provision of Rule 52(a), F. R. Civ. P. has no application to this case.

It is even less clear on what basis the appellants think the Brinker-Johnson case supports their proposition.

> "We have in mind that the finding of a trial court based upon documentary evidence does not carry the same degree of conclusiveness on us as does one made upon oral evidence, but from an examination of the indenture executed by the parties . . . we think the finding of the trial court is substantially supported."
>
> Brinker-Johnson Co. v. Barnes, supra, at 252.

Clearly the statement by the court in the Brinker-Johnson case is dicta and did not relate to the holding of the court. It is respectfully submitted that the dicta is not a correct statement of the law of the Ninth Circuit. The evidence relating to the alleged violation of the cease and desist order were the advertisements which the appellants admitted were published in the Washington, D. C., papers. On the basis of this primary evidence, the trial court drew inferences from which it found that there was a violation of the cease and desist order. It is the appellee's position that all of these findings were findings of fact inferred from documentary and uncontradicted testimony which, under the rule of the Ninth Circuit, are binding on the appellate court unless "clearly erroneous". The leading case in this circuit relating to that problem is Lundgren v. Freeman, 307 F. 2d 104 (9th Cir. 1962). The problem

to which the Lundgren court addressed itself is set in the following language:

> "There was some evidence that there was, in fact, no mutual mistake, but we are satisfied that the trial court's finding is supported by the evidence, viewed as a whole, and was not 'clearly erroneous'. We are bound by Rule 52(a), F. R. Civ. P., which provides that: 'findings of fact shall not be set aside unless clearly erroneous * * *' Therefore, we may not substitute our judgment if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men.
>
> "There seems to be considerable confusion as to whether Rule 52(a) allows an appellate court to disregard a trial court's findings where fact issues were decided on written evidence alone, so that the appellate court is as able to determine credibility as the trial court."
>
> Lundgren v. Freeman, supra, at 113.

After noting that there have been cases on both sides of the question in the Ninth Circuit, the Lundgren court went on to adopt the rationale now set forth in the case of Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278 (1960), where the Supreme Court talked about the "fact finding tribunal's experience with the

mainsprings of human conduct." The Ninth Circuit in the Lundgren case then expressed the view, at page 115, that many of the Ninth Circuit cases seemed to hold that the appellate court could review the facts de novo could be distinguished by the Commissioner of Internal Revenue v. Duberstein case, supra.

> "In all these cases the inferences drawn from the undisputed facts seem to have been inferences derived from application of a legal standard and not inferences derived from having had 'experience with the mainsprings of human conduct.'
>
> "In the principal case the finding of mutual mistake can be fairly said to be derived not solely from application of legal standards, but from the trial judge's experience with human affairs."
>
> Lundgren v. Freeman, supra, at 115.

This rule has been followed in other cases, and finds its most recent expression in the case of Stauffer Laboratories, Inc. v. F. T. C., 343 F. 2d 75 (9th Cir. 1965).

> "Although the texts of these advertisements are before us, and in that sense the facts as to what the advertisements were are undisputed, yet we are not for that reason free to disagree with the Commission's finding to the effect that the advertisements did make these claims for the effectiveness of the device independent of the plan. In reviewing the findings of a district court, the established rule,

recognized by this court, is that in respect to inferences drawn from undisputed facts the findings may not be set aside unless found to be clearly erroneous. Lundgren v. Freeman, 9 Cir., 307 F.2d 104, 115. In that case this court adopted the rationale employed by the Supreme Court in Commissioner v. Duberstein, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218, where the Court said: 'Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct. . . . ' "

Stauffer Laboratories, Inc. v. F.T.C., supra, at 78.

The test therefore is whether or not the finding by the trial court that the advertisements which were admittedly published as alleged in Counts Three, Four, Five and Six of the Second Amended Complaint were clearly erroneous. We submit that the findings were not clearly erroneous, but that a review of all of the advertisements will show that the findings by the trial court were the correct findings.

III

THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE PENALTY ACTION.

At pages 45 and 46 of the Appellants' Opening Brief they argue that the court below was without subject matter jurisdiction, particularly over Counts Three, Four, Five and Six. The arguments advanced by the appellants do not contain accurate statements of the facts. The Second Amended Complaint (T. R. 2) alleges that "the United States of America, by the United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, and upon request of the Federal Trade Commission, brings this action to recover civil penalties . . . ". While this allegation is not, perhaps, a formal certification allegation, it certainly fulfills every requirement of United States v. St. Regis Paper Company, 355 F. 2d 688 (2nd Cir. 1966), for an allegation of certification of the facts found by the Federal Trade Commission to the Attorney General. Certainly this is true where, as here, the appellants only offer the suggestion that the court might be without subject matter jurisdiction and do not, even here, suggest that the Federal Trade Commission did not certify the facts to the Attorney General.

The appellants argue at page 46 of their Opening Brief that no evidence was introduced to show that the required certification of facts by the Commission to the Attorney General had been made. This statement is not true. The appellants correctly state that the

possibility of lack of subject matter jurisdiction was raised by the appellants (for the first time) on their motion for a new trial. In opposition to the motion for a new trial, the appellee filed the affidavit of Joseph S. Saunders on April 12, 1967. This document was not designated as a part of the record to be transmitted to the Clerk of the Ninth Circuit, but is noted in the minute orders [T.R. 112].

On page 46 of their Opening Brief, the defendants also state that there was no finding by the court of the required certification of facts. This statement is also incorrect. In his Memorandum Decision on Motion for New Trial filed May 1, 1967 [T.R. 102], the Honorable Judge William P. Gray found on the first page that the United States Attorney, under the direction of the Attorney General, pursuant to the request of the Federal Trade Commission, brought this action. This finding by the trial court is completely consistent with the evidence before it, to wit: the affidavit of Joseph S. Saunders, and is not contested by any evidence to the contrary by the appellants, although they choose not to advise this Court of what actually happened in the court below on the question of subject matter jurisdiction under the St. Regis rule.

The only thing remaining to the appellants' argument of a lack of subject matter jurisdiction is the suggestion that the court below lacked it particularly over Counts Three, Four and Five, which were added after the original action had been instituted. The effect of the appellants' argument is that Rule 15(d), Federal

Rule of Civil Procedure has no applicability to actions brought under the Federal Trade Commission Act, and as new facts develop during the course of the preparation of a case which had been certified by the Federal Trade Commission for trial would have to be formally certified as a new and separate matter. We suggest to the court that even the majority in the St. Regis case would not have gone that far. It would be a highly technical requirement, and would be a severe departure from the spirit of the Federal Rules of Civil Procedure, to argue that once a lawsuit has been instituted the Federal Trade Commission is required to certify facts as they develop during the United States Attorney's discovery activities and trial preparations. It would make no sense to require the government under circumstances such as these to go back to the Federal Trade Commission with each new discovery and obtain a certification. The purposes behind the Federal Trade Commission Act do not require such a holding. Neither does the holding by the St. Regis majority which was concerned least a person be faced with possible prosecution for violation of a cease and desist order by the Attorney General while at the same time satisfying the Federal Trade Commission with his compliance. The facts of the St. Regis case arose when the United States Attorney developed information in a grand jury investigation which, because it was secret, could not be furnished to the Federal Trade Commission. The concern that the St. Regis majority had for the possibility of suits for violations of cease and desist orders which were not under the control of the Federal

Trade Commission, simply does not exist under the facts of this case.

IV

THE DISTRICT COURT HAD THE POWER TO ISSUE A WRIT OF INJUNCTION AND IT DID NOT ABUSE ITS DISCRETION IN ISSUING THE WRIT OF INJUNCTION.

The appellants argue that even if the trial court had power to issue an injunction, it was error to do so because the pleadings did not specifically ask for injunctive relief. In answer to this line of argument, the appellee would point out that the same considerations apply to these arguments as applied to the appellants' argument that the advertisements did not violate the cease and desist orders. The facts upon which the trial court concluded that an injunction should issue must be affirmed unless they are shown to be clearly erroneous.

In this action, the United States filed its original complaint alleging two violations of the cease and desist order. During the pendency of the lawsuit, a second amended complaint was filed alleging in four additional counts numerous violations of the cease and desist order by publication in five newspapers and interstate circulation after the original complaint was filed. At the trial, there was evidence to support these subsequent violations. On the basis of this showing of repeated violations of the cease and desist order, the trial court determined that an injunction was a

proper remedy. The court's Findings of Fact and Conclusions of Law [T. R. 88, 95] set out the violation alleged in Counts Three, Four, Five and Six are sufficiently specific findings to support the injunction.

The appellants have cited in their argument that the court should not have issued an injunction in the absence of pleadings to show that the appellee is entitled to the injunction is clearly without merit. All of the facts which were relied upon by the government in asking for the injunction during final arguments of the case were pleaded with a great deal of particularity in the second amended complaint. The trial proceeded as a trial on these issues and the government introduced nothing new in support of its request for an injunction. The appellants have consistently overlooked the well known proposition that a party will be given all of the relief to which he is entitled under a general prayer. The appellants have also overlooked with the same degree of consistency the fact that:

> Federal Rules of Civil Procedure, Rule 15(b):
>
> "(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend

does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Since the injunction in this case was requested on the grounds that the defendants had repeatedly violated the cease and desist order, and the evidence to support the request for the injunction was in fact the evidence showing the violations alleged in the complaint, the request for the injunction fell squarely within the language of the prayer of the second amended complaint [T.R. 2] "that plaintiff be given such other and further relief as this court may deem just and proper.", and the coverage of Rule 15(b), Federal Rules of Civil Procedure.

It is clear that in granting the injunction the trial court was exercising its discretion.

"... When such a situation arises, it is the duty of the trial court to ascertain if there is reason to fear future violations. The court, in the discharge

of this function, is invested with a sound discretion in reaching its conclusion as to whether an injunction should or should not be issued, and its decision will not be disturbed on appeal unless it appears that there has been an abuse of discretion."

Walling v. Shenandoah-Dives Mining Co.,
134 F.2d 395, 398 (10th Cir. 1943).

There is nothing in the record which would support the contention by the appellants that the trial court abused its discretion.

V

THE DISTRICT COURT DID HAVE POWER TO ISSUE AN INJUNCTION.

Running throughout most of the pages of the Appellants' Opening Brief are arguments that the District Court had no power to issue an injunction in aid of its monetary judgment. The appellants' arguments seem to be threefold. They argue that the case of United States v. Parkinson, 135 F. Supp. 208 (S.D. Cal. 1955), aff'd 240 F.2d 918 (9th Cir. 1956), holds that the court lacks jurisdiction to issue an injunction unless that power is specifically given to the court by statute. The second line of argument of the appellants is that in Federal Trade Commission cases the district court has no equitable jurisdiction, which is lodged in the Court of Appeals. The third line of argument that with the elimination of writs of mandamus by the promulgation of

Rule 81(d), Federal Rules of Civil Procedure, whatever equitable jurisdiction the District Court had was eliminated. We will discuss these three matters in that order and will then argue that the trial court had jurisdiction to issue the injunction whether or not it had equitable jurisdiction to issue writs of mandamus under 15 U.S.C. §49.

If the Court finds that the Parkinson case, supra, has any application to this one, it should be overruled. In affirming the opinion of the trial court, the Parkinson court said that:

> "The use of extraordinary remedies of equity in governmental litigation should never be permitted by the courts unless clearly authorized by the statute in expressed terms."
>
> United States v. Parkinson, supra, page 922.

This holding is clearly inconsistent with the holding in Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960). There, the Secretary of Labor brought an action to enjoin an employer from violating Section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. §215(a)(3)). The trial court granted the injunction, but, as a matter of discretion refused the plaintiff's prayer that the defendant be required to make reimbursement for loss of wages caused by the unlawful discharge or other discrimination. The Court of Appeals affirmed on the basis that the District Court lacked jurisdiction to order such reimbursement, because any such jurisdiction " . . . must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment." (260

F. 2d 929, 933). The question involved was virtually identical with that involved in the Parkinson case since in both cases the government sought money damages as an ancillary remedy to an injunction proceeding. The important language used by Mr. Justice Harlin is found at pages 291 and 292, and is as follows:

" . . . We upheld the implied power to order reimbursement, in language of the greatest relevance here:

> 'Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .

'Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503. . . . ' 328 U.S., at 397-398.

"The applicability of this principle is not to be denied, either because the Court there considered a wartime statute, or because, having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement. Id., at 399. When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. . . . "

Mitchell v. DeMario Jewelry, supra, pages 291 and 292.

The DeMario case has been cited and quoted in a number of recent cases throughout the country. It was recently cited in the case of Katcher v. Lande, 382 U.S. 323, 338 (1965) and a number of circuits have expressly followed it. See Goldberg v. Dama Manufacturing Corp., 302 F. 2d 152 (5th Cir. 1962); State of Alabama v. United States, 304 F. 2d 583, 591 (5th Cir. 1962), ("Thus the relief in matters of public, rather than private, interest may be quite different from that ordinarily granted."); and Reich v. Webb, 336 F. 2d 153, 158 (9th Cir. 1964), ("Only a clear expression of legislative intent will limit an equity court's power in this regard.")

Neither the Supreme Court in the DeMario case, supra, nor any of the Circuit Courts have cited United States v. Parkinson, supra. As far as we know, it has not been followed, expressly overruled or even noticed since it was written. There can be no doubt, however, that the express language of the Supreme Court is determinative of the issue of the District Court power to grant an injunction and the exercise of its equity power.

The question then becomes whether the court has any equity power in a suit under 15 U.S.C. §45(L). The trial court in its memorandum decision filed May 1, 1967 (T.R. 102), carefully considered the arguments advanced by the appellants, which are the same arguments presented here. We agree with the trial court that "it seems . . . quite clear that subsections (c) and (d) provide for the participation of the Court of Appeals only for the purpose of reviewing an order of the Commission before it becomes final,

and that once such review is undertaken neither the Commission nor any other entity has any jurisdiction to interfere in the matter. These provisions have nothing to do with proceedings under § (L) which may be instituted only after a Cease and Desist Order 'has become final' and the time for review has passed."

The Honorable Judge Gray concluded that if he had any equity jurisdiction whatever with respect to this case, all the inherent powers of the equity court were available to him. We agree entirely with this statement and also with the learned trial judge's determination that he did have equity jurisdiction under the fourth paragraph of §49, Title 15, U.S.C.

The state of the law is that:

> ". . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to the like inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503."
>
> Porter v. Warner Co., 328 U.S. 397-398 (1946).

In an attempt to avoid the effect of this language in the holding in the DeMario Jewelry case, supra, the appellants have

attempted to show that exclusive jurisdiction to grant injunctions has been vested with the Court of Appeals by the Federal Trade Commission Act. Nowhere in their brief do the appellants reach the critical issue which was considered by Judge Gray that the exclusiveness of the jurisdiction in the Court of Appeals only relates to that period of time in which the person ordered to cease and desist can take review of the Cease and Desist Order. In at least eight places in their brief, the appellants make such statements as "and it provided in section 5d that the jurisdiction of the Courts of Appeal to enforce those final Cease and Desist Orders of the Commission should be exclusive." (Appellants' Opening Brief, p. 21); "Since the Circuit Courts of Appeal were vested with exclusive jurisdiction to enforce final Cease and Desist Orders of the Commission . . . " (Appellants' Opening Brief, p. 38, lines 2, 3 and 4); and "Such section is not applicable to final Cease and Desist Orders, in which cases the law provides that exclusive jurisdiction to enforce the orders of the Commission is in the Court of Appeals . . . " (Appellants' Opening Brief, p. 43, lines 15-17).

Such statements are completely incorrect. The jurisdiction of the Court of Appeals to enforce orders of the Federal Trade Commission arises only when review is sought directly in the Court of Appeals under the provisions of 15 U.S.C. §45(c). Jurisdiction of the Court of Appeals to enforce or set aside orders of the Commission exists only so long as the Federal Trade Commission's order has not become final under provisions of 15 U.S.C.

§45(g); Crown Zellerbach v. Federal Trade Commission, 156 F. 2d 927 (9th Cir. 1946). (It is interesting to note that the appellants in their Opening Brief cited the Crown Zellerbach case at page 40 with the statement that it cited and followed the case of Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45 [8th Cir. 1922]; but the inference that the Crown Zellerbach case supported the Chamber of Commerce holding that the District Court did not have jurisdiction to make certain orders was not the issue before the Ninth Circuit in Crown Zellerbach and the Chamber of Commerce case was not cited as authority for any such position.)

The appellants' whole case turns on the question of whether the Court of Appeals was vested with exclusive jurisdiction to enforce final Cease and Desist Orders of the Federal Trade Commission and on an argument that the Parkinson case, supra, is still the law. We believe we have successfully demonstrated that Parkinson has been overruled by the Supreme Court in the DeMario case, supra. We also believe that it is abundantly clear that the exclusive jurisdiction of the Circuit Court over Cease and Desist Orders lasts only so long as the Cease and Desist Order is reviewable and does not continue over a final Cease and Desist Order.

In addition to these arguments, the appellants have cited Rule 81(b) of the Federal Rules of Civil Procedure to support their argument that the District Court has no equitable jurisdiction in this case. There is no substance in the appellants' argument that the adoption of Rule 81(b) by the Supreme Court has abrogated the

District Court's power to issue equitable writs. In the first place, the language of Rule 81(b) itself makes it apparent that the relief which a litigant could formerly obtain by a Writ of Mandamus is still obtainable under the Federal Rules of Civil Procedure by appropriate action or by appropriate motion. In the second place, 28 U.S.C. §2072 specifically provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is, therefore, clear that, even if Rule 81(b) purported to strip the District Courts of their power to issue extraordinary writs, it cannot deprive a District Court from any right or power it formerly possessed. It is the appellee's position that the arguments of the appellants relating to Rule 81(b) are entirely irrelevant to the issues of this appeal.

The District Court had the power to issue a Writ of Injunction in this case. That power is confirmed by the Supreme Court's decision in the DeMario case, supra. It is confirmed by the fact that equitable jurisdiction was conferred on the District Courts under the Federal Trade Commission Act, as noted by Judge Gray, in 15 U.S.C. §49. Equitable jurisdiction was conferred on the District Courts under 15 U.S.C. §§52, 53 and 57, among others. In the absence of a clear congressional intent to limit the District Court's equitable jurisdiction, that jurisdiction is complete. Mitchell v. DeMario Jewelry, Inc., supra. In

addition to this evidence that the District Court had jurisdiction to issue an injunction, 28 U.S.C. §1652 provides that:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

We submit that this provision of Title 28, U.S.C. is in itself enough authority for the District Courts having issued the injunction in this case. For all of these reasons, it is respectfully submitted that the decision of the District Court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Larry L. Dier

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